Petition

Office-Supreme Court, U.S.
FILED
AUG 10 1981
ALEXANDER L. STEVAS,
CLERK

81-259

No.

In the Supreme Court of the United States

October Term 1981

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, ET AL.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BILL ALLAIN, Attorney General
State of Mississippi
PETER M. STOCKETT, JR.
Assistant Attorney General
(Counsel of Record)
P. O. Box 220
Jackson, Mississippi 39205
Telephone: (601) 354-7130
Attorneys for Petitioners

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED

1. Whether a non-discriminatory state tax refund rule should be applied by a federal court to govern a claim by the United States for refund of monies unconstitutionally collected by the state?

2. In awarding pre-judgment interest to the United States, did the Court of Appeals for Fifth Circuit depart from the principles announced by this Court in *Board of County Commissioners v. United States*, 308 U.S. 343 (1939)?

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No.

In the Supreme Court of the United States

October Term, 1981

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, ET AL.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, the State of Mississippi and the State Tax Commission [hereinafter collectively referred to as the State],[1] respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 11, 1981.

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1. The parties to this proceeding are as follows. The petitioners are the State of Mississippi and its State Tax Commission. The petitioners will be collectively referred to as the State.

The respondent is the United States of America.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as *United States v. State Tax Commission*, 645 F.2d 4 (5th Cir. 1981), and appears in the Appendix hereto as Appendix A. The March 31, 1980, judgment of the United States District Court for the Southern District of Mississippi is unreported and appears in the Appendix hereto as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on May 11, 1981, Appendix C. A timely petition for rehearing en banc was denied on June 10, 1981, 650 F.2d 282 (5th Cir. 1981), Appendix D, and this petition for a writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution, U.S. Const., Art. VI, states:

> This Constitution, and the Laws of the United States shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding.

Miss. Code Ann. § 27-65-49 (1972), provides in pertinent part:

> In any such suit [to collect refund of an illegally exacted sales tax], the plaintiff must allege and prove

that he alone bore the burden of the tax sued for and did not directly or indirectly collect the tax from his customers. It is the declared purpose of this section to make certain that any tax refunded will go to the person who has borne the burden of the illegal tax, and therefore, is entitled in justice and good conscience to such relief and is the real party in interest.

. . .

Miss. Code Ann. § 27-73-3 (1972) provides in pertinent part:

(1) In any suit, application or proceedings by any tax payer for any recovery or refund of privilege, franchise, or other excise tax, which has been paid to any tax collecting officer or commission of the state, any county, or municipality, by any person, firm or corporation or which may have been paid into the state treasury, the persons seeking such recovery or refund of such taxes must allege and prove that he alone bore the burden of the tax involved and did not directly or indirectly collect the tax from any other person.

(2) It is the declared purpose of this section to make certain that any such taxes recovered by or refunded to any tax payer will be recovered by or go only to, as the case may be, to person who has borne the burden of any illegal tax, or any erroneous or mistaken payment or any over-payment of any such privilege, franchise, or other excise tax for which such person, firm, or corporation was not liable and, therefore, that the person seeking such recovery or refund thereof is entitled in justice and good conscience to the relief requested and is, therefore, the real party in interest.

. . . .

STATEMENT OF THE CASE

This case has been before this Court on two previous occasions, *United States v. State Tax Commission*, 412 U.S. 363 (1973), and *United States v. State Tax Commission*, 421 U.S. 599 (1975).

The United States initiated this action in the United States District Court for the Southern District of Mississippi in 1969. The United States challenged constitutionality of the wholesale liquor mark-up tax imposed by the Mississippi State Tax Commission on all liquor sold in the State of Mississippi, including liquor sold to the federal military installations located there. The district court's subject matter jurisdiction was invoked pursuant to 28 U.S.C. § 1345.

The United States alleged that the various clubs, messes, and stores operating as instrumentalities of the United States on non-appropriated funds on these four bases engaged in the purchase of alcoholic beverages for resale. The core of the United States' challenge to the imposition of this tax was that it infringed on the immunity of the United States from state taxation. The United States sought three types of relief: (1) a declaration that the state tax commission regulation authorizing the liquor mark-up tax was null and void; (2) an injunction restraining the state from regulating, taxing, or controlling the purchase of alcoholic beverages by the United States' instrumentality; and (3) a judgment awarding the United States the refund of the liquor mark-up paid by the United States.

A three-judge district court was convened. On two occasions the district court ruled in favor of the State. *United States v. State Tax Commission*, 340 F. Supp. 903

(S.D. Miss. 1972) (three-judge court); *United States v. State Tax Commission*, 378 F. Supp. 558 (S.D. Miss. 1974) (three-judge court). This Court reversed both of these decisions. *United States v. State Tax Commission*, 412 U.S. 363 (1973); *United States v. State Tax Commission*, 421 U.S. 599 (1975). In its second opinion in this case, this Court held that "viewing the mark-up as a sales tax" the legal instance of that tax rested on the federal instrumentalities. 421 U.S. at 610. This Court went on to hold that "the mark-up is unconstitutional as a tax imposed upon the United States and its instrumentalities." *Id.* at 613. Accordingly, this Court reversed the district court's judgment and remanded the case for further proceedings consistent with this Court's opinion.

On remand, the three-judge district court remanded the United States' refund claim to the single managing district judge for disposition. The United States and the State submitted affidavits and additional stipulations of fact to the district judge. Among the affidavits before the district court were two affidavits submitted by the state from two of the United States' own affiants in which the two affiants, stated that to their knowledge, the federal instrumentalities never sold their liquor at a price less than its total cost, Appendix E ¶ 4; Appendix F, *i.e.*, including the state's mark-up. The state contended that the United States was not entitled to a refund unless it proved that it bore the burden of the tax and that it did not pass this tax on to any other person. In making this contention, the state relied in part on two state statutes, Miss. Code Ann. §§ 27-65-49 & 27-73-3 (1972).

The district judge failed to address the state's contention by summarily concluding that this Court's second opinion "finally settled" the question of the state's liability thereon to refund the amounts paid by the United States

as a mark-up on its liquor. Accordingly, the district judge awarded the United States judgment in the amount of $1,371,367.81 plus post-judgment interest.

From this judgment, the state appealed, and the United States cross-appealed on the district court's failure to award it pre-judgment interest.

On appeal, the United States Court of Appeals for the Fifth Circuit affirmed the district court's judgment insofar as it awarded a refund to the United States. However, the Fifth Circuit concluded that the United States was entitled to pre-judgment interest; and, therefore, remanded this case to the district court for computation and award of pre-judgment interest.

The Fifth Circuit's brief analysis of this case was stated as follows:

> The Tax Commission argues that the United States is not entitled to a refund because of its failure to comply with the requirements found in Miss. Code Ann. § 27-73-3(1) (1972). That statute requires a person seeking a tax refund to allege and prove that he alone bore the burden of the tax. That state statute, however, has no application in this case. The Supreme Court has determined that the tax is unconstitutional and it follows that the amount of tax paid by the United States should be returned. The retention by the state of an unconstitutional tax is as much a violation of the Constitution as was the collection of the tax in the first instance. *See Carpenter v. Shaw,* 280 U.S. 363, 369, 50 S.Ct. 121, 123, 74 L.Ed. 478 (1930). And the right of the United States as sovereign, to recover an illegal tax is in no way dependent on compliance with the provisions of state law. *See id.*; *City of New Orleans v. United States,*

371 F.2d 21, 28 (5th Cir.) *cert. denied*, 387 U.S. 994, 87 S.Ct. 2076, 18 L.Ed.2d 1330 (1967).

We also determine that the United States is entitled to prejudgment interest. The United States was unconstitutionally deprived of the use of its funds from the time of payment, and, therefore, to be made whole, is entitled to interest from that date. Accordingly, we remand to the district court for a computation of the prejudgment interest to which the United States is entitled at the rate of 6% per annum.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's opinion has implicitly decided an important question of federal law which has not been, but should be, settled by this Court. In addition, the Fifth Circuit's opinion conflicts with applicable decisions of this court on the issue of awarding pre-judgment interest in this case.

I. The Fifth Circuit Erred In Refusing To Apply The State Tax Refund Rule As The Federal Rule Of Decision To Govern The United States' Refund Claim In This Case.

Both the district court and the Fifth Circuit failed to apply the appropriate federal common law choice-of-law analysis to decide the United States' refund claim in this case. Of course, there can be no doubt that the federal constitutional issues raised in this case by the United States sufficiently implicate federal interest "to warrant the application of federal law." *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727 (1979). *Accord, Georgia Power Co. v. Sanders*, 617 F.2d 1112, 1115 (5th Cir. 1980) (en banc), *cert. denied sub nom. Georgia Power Co. v. 138.30 Acres of Land*, 101 S.Ct. 1403 (1981). Thus,

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the critical inquiry in this case is what laws should supply the appropriate federal rule of decision.

Here, the Fifth Circuit's analysis misses the mark. The Fifth Circuit merely concluded that "[t]he retention by the state of unconstitutional taxes is as much a violation of the Constitution as was the collection of the tax in the first instance." 645 F.2d at 5, citing *Carpenter v. Shaw*, 280 U.S. 363, 369 (1930). However, *Carpenter* merely stated that a *denial* by a state court of recovery of taxes exacted in violation of the Constitution was itself in violation of the Fourteenth Amendment to the United States Constitution. Here, the Mississippi refund rule *does not* deny recovery of the unconstitutionally collected taxes if the United States shows that it actually paid the taxes and did not pass it on to another person.

In *United States v. Standard Oil Co.*, 332 U.S. 301 (1947), this Court noted that in a given case "state law may furnish convenient solutions in no way inconsistent with the adequate protection of the federal interests." *Id.* at 309. This is just such a case. The state refund rule would allow the United States to recover 100% of the liquor mark-up which it paid if it did *not* pass this on to another person. This is the crux of this case. Here, the United States did, in fact, pass the liquor mark-up which it paid on to the purchasers of its liquor. Two of the United States' own affiants acknowledged that they know of no instance where the United States sold its liquor at less than its total acquisition cost, Appendix E and Appendix F, that is, including the mark-up which the United States paid on liquor. Here, an application of the Mississippi refund rule would merely acknowledge what this Court has previously noted: "the economic burden of taxes incident to the sale of merchandise is traditionally passed on to the purchasers of merchandise." *Gur-*

ley v. Rhoden, 421 U.S. 200, 204 (1975). *See also United States v. State Tax Commission*, 421 U.S. at 609.

The Fifth Circuit's opinion, in effect, merely applies an automatic federal rule of awarding the United States a refund of unconstitutionally collected taxes without any consideration of whether an application of state refund rule would adversely affect the United States. This Court has previously demanded that there be a showing of "concrete evidence" that adoption of the state rule would "adversely affect the administration of the federal programs." *United States v. Kimbell Foods, Inc.*, supra, 440 U.S. at 730.

The Fifth Circuit's opinion is also contrary to a principle previously announced by this Court:

> In the absence of explicit legislative policy cutting across state interests, we draw upon a general principle that the beneficiaries of federal rights are not to have a privileged position over other aggreived taxpayers in their relation with the states or their political subdivision.

Board of County Commissioners v. United States, 308 U.S. 343, 352 (1939), cited and quoted with approval in *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 674-75 & n.20 (1979).

Here, the Fifth Circuit's opinion places the United States in a privileged position over any other taxpayer in seeking a refund from the state. United States, according to the Fifth Circuit, is automatically entitled to a refund of the sales tax collected from it, while any other person would be required to prove that it actually bore the economic burden of the tax and that it did not pass the tax on to another person.

For these reasons, the Fifth Circuit's opinion decides the important question of federal law which this court should resolve to provide guidance to the lower courts in this area.

II. The Fifth Circuit's Award Of Pre-Judgment Interest Is Contrary To The Principles Announced By This Court In Board of County Commissioners v. United States, 308 U.S. 343 (1939).

The Fifth Circuit's award of pre-judgment interest to the United States is likewise worthy of review by this Court.

The Fifth Circuit did not weigh any of the equities in this case in determining whether to award pre-judgment interest.

In *Board of County Commissioners v. United States*, 308 U.S. 343 (1939), this Court applied a careful weighing of equities in determining whether to award pre-judgment interest. The Fifth Circuit's failure to weigh the equities is contrary to this Court's decision in *Board of County Commissioners*.

For this reason, this Court should grant certiorari to review the issue of the propriety of awarding pre-judgment interest in this case.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

BILL ALLAIN, Attorney General
State of Mississippi
P. L. DOUGLAS
First Assistant Attorney General
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 354-7130
Attorneys for Petitioners

APPENDIX

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee Cross-Appellant,

v.

STATE TAX COMMISSION OF the STATE OF MISSISSIPPI et al.,
Defendants-Appellants Cross-Appellees.

No. 80-3338.
United States Court of Appeals,
Fifth Circuit.
Unit A

May 11, 1981.

The United States sued to recover amount of wholesale liquor markup tax unconstitutionally assessed on liquor sold to federal military installations in Mississippi. The United States District Court for the Southern District of Mississippi, William Harold Cox, J., entered judgment for the United States with interest from date of judgment, and appeals were taken. The Court of Appeals held that: (1) Government was not required to comply with statutory refund procedures, and (2) Government was entitled to prejudgment interest.

Remanded.

1. Intoxicating Liquors (Key) 96

Failure of United States to comply with requirements of Mississippi tax refund statute did not bar refund of wholesale liquor markup tax which the state unconstitutionally assessed on liquor sold to federal military installations in Mississippi. Miss. Code 1972, § 27-73-3(1).

2. Taxation (Key) 5

Retention by the state of an unconstitutional tax assessed against an entity of the federal government is as much a violation of the Constitution as is collection of the tax in the first instance, and right of the United States, as sovereign, to recover such illegal tax is in no way dependent on compliance with provisions of state law.

3. Interest (Key) 39(2)

The United States was entitled to prejudgment interest on amount it paid for wholesale liquor markup tax which the state of Mississippi unconstitutionally assessed on liquor sold to federal military installations in Mississippi. Miss. Code 1972, § 27-73-3(1).

Hubbard T. Saunders, IV, Asst. Atty. Gen., Jackson, Miss., for plaintiff-appellee cross-appellant.

Robert E. Hauberg, U. S. Atty., Jackson, Miss., M. Carr Ferguson, Gilbert E. Andrews, Michael L. Paup, Richard Farber, Steven I. Frahm, Tax Div., U. S. Dept. of Justice, Washington, D. C., for defendants-appellants cross-appellees.

Appeals from the United States District Court for the Southern District of Mississippi.

SKELTON*, Senior Judge, and RUBIN and REAVLEY, Circuit Judges.

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*Senior Judge of the United States Court of Claims, sitting by designation.

PER CURIAM:

Regulation 25 of the Mississippi Tax Commission imposed a wholesale liquor markup tax on all liquor sold with-

in the state, including liquor sold to the federal military installations located there. On its second trip to the Supreme Court, Regulation 25 was held to impose an unconstitutional state tax upon these instrumentalities of the United States government. *United States v. State Tax Commission*, 421 U.S. 599, 95 S.Ct. 1872, 44 L.Ed.2d 404 (1975).[1] On remand, the district court held that the United States was entitled to a refund of the amount collected at the military bases to pay the unconstitutional tax, stipulated to be $1,371,367.81. Judgment was entered for the United States in that amount, plus 6% interest from the date of judgment. On appeal, the Tax Commission contends that the district court erred in ordering the state of Mississippi to refund the amount of tax paid by the United States. The United States also appeals, contending that the district judge should have granted the United States prejudgment interest on the amounts collected by the Tax Commission in the years 1966 through 1975.

[1, 2] The Tax Commission argues that the United States is not entitled to a refund because of its failure to comply with the requirements found in Miss.Code. Ann. § 27-73-3(1) (1972). That statute requires a person seeking a tax refund to allege and prove that he alone bore the burden of the tax. That state statute, however, has no application in this case. The Supreme Court has determined that the tax is unconstitutional and it follows that the amount of tax paid by the United States should be returned. The retention by the state of an unconstitutional tax is as much a violation of the Constitution as was the collection of the tax in the first instance. *See Carpenter v. Shaw*,

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1. When this case first went to the Supreme Court, the Court held that the Twenty-First Amendment did not empower the state to impose the tax on the liquor sold to the military installations. *United States v. Tax Commission*, 412 U.S. 363, 93 S.Ct. 2183, 37 L.Ed.2d 1 (1973).

280 U.S. 363, 369, 50 S.Ct. 121, 123, 74 L.Ed. 478 (1930). And the right of the United States, as sovereign, to recover an illegal tax is in no way dependent on compliance with the provisions of state law. *See id.*; *City of New Orleans v. United States*, 371 F.2d 21, 28 (5th Cir.), *cert. denied*, 387 U.S. 994, 87 S.Ct. 2076, 18 L.Ed.2d 1330 (1967).

[3] We also determine that the United States is entitled to prejudgment interest. The United States was unconstitutionally deprived of the use of its funds from the time of payment, and, therefore, to be made whole, is entitled to interest from that date. Accordingly, we remand to the district court for a computation of the prejudgment interest to which the United States is entitled at the rate of 6% per annum.

REMANDED.

APPENDIX B

(Filed March 31, 1980)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NUMBER 4554

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI; ARNY RHODEN, CHAIRMAN; JIMMIE WALKER, EXCISE COMMISSIONER; WOODLEY CARR, AD VALOREM COMMISSIONER; KENNETH STEWART, DIRECTOR OF THE ALCOHOLIC BEVERAGE CONTROL DIVISION, MISSISSIPPI STATE TAX COMMISSION; A.F. SUMMER, ATTORNEY GENERAL, STATE OF MISSISSIPPI; AND THE STATE OF MISSISSIPPI,
Defendants.

JUDGMENT

On November 3, 1969, the plaintiff filed this suit in this Court attacking the constitutional validity of Regulation 22 promulgated by the Mississippi Tax Commission for the collection of a markup, or excise tax to be collected from out of state liquor vendors and suppliers who furnished such beverages to the four United States military installations within the state of Mississippi. No relief was sought, or proved against either of the individual defendants in this suit as against them and they will be finally dismissed.[1]

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1. Rule 54(c), Federal Rules of Civil Procedure.

This litigation has been fully heard and has been before the Supreme Court of the United States on two occasions. This controversy was finally settled on the substantive question of liability vel non on June 2, 1975.[2]

The Court effectually held that Regulation 22 was void and that it improperly imposed a tax on these four military installations within the state of Mississippi. The installation at Pascagoula was not included in the complaint and is not included in this judgment.

On February 9, 1977, the three judge court determined that the question of the amount due the United States by the State of Mississippi involved only the question of determining as to the amount of money collected from these out of state suppliers of intoxicating liquor at these United States military bases, and that such question should, therefore, be decided by a single judge. The undersigned as managing judge accordingly assumes that role.

The Court has carefully examined and considered the affidavits, the depositions and other facts and circumstances which it is entitled to consider and holds as a fact and adjudges as a matter of law that the State of Mississippi has thus collected and retains in its hands markup in the principal amount of $1,371,367.81.

Accordingly, it is ordered and adjudged by the Court that the State of Mississippi is indebted to the United States of America in the principal sum of $1,371,367.81, and that the United States do have of and recover from the State of Mississippi in the said principal sum of $1,371,367.81.

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2. *United States v. State Tax Commission of Mississippi et al*, (1973) 412 U.S. 363, 93 S.Ct. 2183, Justices Douglas and Rehnquist dissenting; *United States v. State Tax Commission of the State of Mississippi et al*, 421 U.S. 599, 95 S.Ct. 1872, Justices Douglas and Rehnquist dissenting.

It is further ordered and adjudged by the Court that said award shall bear interest at the rate provided by Title 75, Mississippi Code 1972, § 75-17-7 in the amount of 6% on said award which prevailed at the institution of this suit as required by 28 U.S.C.A. § 1961 after this date.

The plaintiff is entitled to an award of unpaid court costs to be taxed by the Clerk of this Court according to the Federal Rules of Civil Procedure.

ORDERED AND ADJUDGED, this March 31, A. D., 1980.

/s/ Harold Cox
United States District Judge

APPENDIX C

(Filed June 23, 1981)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 80-3338

D. C. Docket No. CI-4554

UNITED STATES OF AMERICA,
Plaintiff-Appellee
Cross-Appellant,

versus

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, et al.,
Defendants-Appellants
Cross-Appellees.

Appeals from the United States District Court for the Southern District of Mississippi

Before SKELTON*, Senior Judge, and RUBIN and REAVLEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is

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*Senior Judge of the United States Court of Claims, sitting by designation.

hereby, remanded to the said District Court for proceedings consistent with the opinion of this Court;

It is further ordered that defendants-appellants, cross-appellees pay to plaintiff-appellee, cross-appellant, the costs on appeal to be taxed by the Clerk of this Court.

May 11, 1981

ISSUED AS MANDATE: JUNE 22, 1981

APPENDIX D

(Filed June 10, 1981)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 80-3338

UNITED STATES OF AMERICA,
Plaintiff-Appellee-Cross Appellant,

versus

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, ET AL,
Defendants-Appellants-Cross Appellees.

Appeal from the United States District Court for the Southern District of Mississippi

ON PETITION FOR REHEARING AND PETITION FOR REHEARNG EN BANC

(Opinion May 11, 1981, 5 Cir., 198...., ...F.2d.....).

Before SKELTON*, Senior Judge, and RUBIN and REAVLEY, Circuit Judges.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

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*Senior Judge of the United States Court of Claims, sitting by designation.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35 Federal Rules of Appellate Procedure: Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley
United States Circuit Judge

CLERK'S NOTE:
SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE STATE OF MISSISSIPPI

CIVIL ACTION NO. 4554

UNITED STATES OF AMERICA,
Plaintiff.

v.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, et al.,
Defendants.

AFFIDAVIT

Franklin L. Deibert, being duly sworn, said the following:

1. In February 1967, I accepted employment with the Navy Exchange, NAS, Meridian as manager of the Country Store which contained Consolidated Liquor Store. While direct responsibility for ordering and checking invoices was under the Food Service Manager and the Office Manager I know of my own personal knowledge that the state imposed markup was charged and collected on all liquor and wine purchased.

2. When establishing the cost of liquor, I included as costs all amounts paid to distillers for any and all purposes and all State taxes excluding retail sales tax.

3. In establishing the profit margin for the retail Package Store, the markup averaged 25 percent.

4. I never sold or knew of any occasion where any liquors were sold below cost.

5. There are a number of personnel at the Naval Air Station who live off base.

6. A percentage of the customers of the Consolidated Package Store at Meridian Naval Air Station are off-base residents.

7. A percentage of the off-post customers transport the beverages off post for off-post consumption.

8. A portion of the general public recognizes that liquor sold at the Package Store was for use off the military premises.

/s/ Franklin L. Deibert
Franklin L. Deibert

STATE OF MISSISSIPPI
COUNTY OF HINDS

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned authority on this the 17th day of March, 1980.

/s/ Laurie Carleton
Notary Public

My Commission Expires: 9-28-83.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 4554

UNITED STATES OF AMERICA,

Versus

STATE TAX COMMISSION OF STATE OF MISSISSIPPI
STATE OF MISSISSIPPI COUNTY OF LEE

SWORN AFFIDAVIT OF OTTO EUGENE MILLER

I, Otto Eugene Miller, who having been first duly swon make the following statements:

My name is, Otto Eugene Miller and I live at 2517 Buckner Avenue, Tupelo, Mississippi. My present employment is that of a police officer with the City of Plantersville, Mississippi and have held this position for approximately two and one half years. Prior to this time I was employed as a civil servant for the United States Air Force, Columbus Air Force Base as Chief, of Morale, Welfare, and Recreation Branch. My duties in that capacity made me responsible for the over-all management of the Officer's Club, the NCO Club, Recreation Branch, the Morale, Welfare, and Recreation Non-appropriated Fund, the golf course, library, and special services. I served in that capacity for approximately six years. In fact, I spent 21 years at Columbus Air Force Base. I went to work there in August, 1958 as Recreation Director, and Assistant Chief, and then as Chief when it was converted to a civilian position. I was Chief of the division from 1971 to 1977. Prior to 1971 I was the Recreation Director,

and part of the job description was to be Assistant Chief of Special Services. As Chief of the Division, I was involved with the purchase and sale of alcoholic beverages and I established the cost of liquor. The cost was determined by an agreement with the Federal Government, and the distillers, as a military price and we would purchase from that military price division from the distiller. The cost included all amounts that we paid to the distiller. The surcharge, or whatever it is called that the State placed on the liquor, was paid to Keesler Air Force Base and put in an Escrow Fund. Keesler Air Force Base handled the matter for all of the military installations from all over Mississippi. Later on we purchased directly from the distillers and included all costs. Originally purchase invoices were handled by the Fiscal Control Office under the Base Comptroller that approved all purchase orders for resale items and then it was later changed to the Morale, Welfare, and Recreation Non-appropriated Fund which was placed under my division. The purchases were made a lot of the time on customer preference and not necessarily bid prices. Our average mark-up was about 30% on the liquor sold from package store and between 65 and 70% profit on the liquor sold at the bars. We never sold any liquor at a price less than total cost. Military personnel and retirees could buy liquor at the package store and take it of off base for consumption. This fact was generally known by the public and liquor was taken off the base by these personnel for consumption.

Sworn to and subscribed before me on this the 19th day of March, 1980.

/s/ Otto E. Miller

(Seal)

/s/ Betty Jo Guin
Notary Public

My Commission Expires 6-25-82.

Opposition

Office - Supreme Court, U.S.
FILED
SEP 14 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-259

In the Supreme Court of the United States

OCTOBER TERM, 1980

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners seek review of the decision below holding that they must refund the state liquor taxes previously held by this Court to have been unconstitutionally collected from instrumentalities of the federal government. Petitioners also seek review of the holding below that they are liable for pre-judgment interest on the amounts unconstitutionally collected.

The pertinent facts may be summarized as follows: This case arises from a 1966 regulation promulgated by the State of Mississippi, through its Tax Commission, which sought to impose a so-called percentage markup on purchases of alcoholic beverages made by military clubs and package stores located on four military bases within Mississippi. See *United States* v. *Mississippi Tax Commission*, 412 U.S.

363, 364-365 (1973). The United States unsuccessfully sought to convince the State that its markup was illegal or, alternatively, that the disputed markup should be placed in an escrow account pending a judicial resolution of the issue (*id.* at 366, 368 n.11).

The United States then filed suit in the district court in 1969 seeking a declaration that the regulation was unconstitutional, an injunction against its continued enforcement and a judgment for the amount of the markup collected, plus interest. Following entry of summary judgment against the United States (340 F. Supp. 903 (S.D. Miss. 1972)), a reversal and remand by this Court (412 U.S. 363 (1973)),[1] and another judgment by the district court against the United States (378 F. Supp. 558 (S.D. Miss. 1974)), this Court held that the legal incidence of the markup (which the Court viewed as a tax) fell upon instrumentalities of the federal government and it was therefore unconstitutional (421 U.S. 599 (1975)). The case was remanded for further proceedings consistent with the Court's opinion.

On remand, the district court determined that the State had collected a total of $1,371,367.81 and that this Court's second opinion was dispositive of its liability to refund the amount unconstitutionally collected. The court did not address, and therefore effectively denied, the United States' claim for prejudgment interest (Pet. App. A5-A7).

The court of appeals affirmed the State's obligation to refund the illegal tax, holding that the retention of an

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[1]In its initial decision in this case, this Court held the Twenty-first Amendment did not permit the State to impose the markup and remanded the case for reconsideration of the government's contention that its imposition violated its constitutional immunity from state taxation.

unconstitutional tax is as much a violation of the Constitution as was its collection in the first instance (Pet. App. A3). The court also determined that the United States was entitled to pre-judgment interest (*id.* at A4).

1. As both courts below correctly recognized, this Court's decision that Mississippi's so-called liquor markup was an unconstitutional tax upon instrumentalities of the federal government was dispositive of the State's liability to refund the illegal tax. Retention by a state of a tax unconstitutionally imposed upon the federal government violates the government's constitutional immunity just as much as the imposition of the tax in the first instance. Cf. *Carpenter* v. *Shaw*, 280 U.S. 363 (1930); *Ward* v. *Love County*, 253 U.S. 17, 24 (1920). Since this Court has declared the liquor markup to be unconstitutional, it follows that Mississippi must refund to the United States the amounts unconstitutionally collected.

2. There is no basis for petitioners' contention (Pet. 8-9) that the courts below erred in failing to give effect to certain procedural requirements imposed under state law on individuals or corporations seeking tax refunds from the State. As the court of appeals correctly pointed out (Pet. App. A4), the right of the United States, as sovereign, to recover an illegal tax is in no way dependent on compliance with the provisions of state law. See *City of New Orleans* v. *United States*, 371 F. 2d 21 (5th Cir.), cert. denied, 387 U.S. 944 (1967); *United States* v. *Independent School District No. 1*, 209 F. 2d 578 (10th Cir. 1954).

Although this Court has on occasion adopted state law as the appropriate federal rule in cases involving the proprietary interests of the United States,[2] it has made clear that where, as here, distinctively federal rights are involved state

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[2]See, *e.g.*, *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979).

law has no application. See *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943); *United States* v. *Standard Oil Co.*, 332 U.S. 301 (1947). The right of the United States to seek vindication of its constitutional immunity from state taxation derives from the Supremacy Clause (Art. VI, cl. 2) of the Constitution, and is not limited by state law.

3. Petitioners also contend (Pet. 10) that the court of appeals ignored this Court's decision in *Board of County Commissioners* v. *United States*, 308 U.S. 343 (1939), by failing to weigh the equities concerning the award of pre-judgment interest. But the parties argued below that a weighing of relative equities controls the award of pre-judgment interest in the federal courts and went on to argue the equities of their respective positions. The court of appeals' statement that, to be made whole, the United States was entitled to pre-judgment interest is a clear indication that it considered the parties' equitable arguments and found those of the United States to be entitled to greater weight.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

SEPTEMBER 1981

DOJ-1981-09